

(SPACE BELOW FOR FILING STAMP ONLY)

CITY ATTORNEY

2012 FEB 10 AM 9:05

SOLOMON E. GRESEN [SBN: 164783]  
STEVEN M. CISCHE [SBN: 125612]  
**LAW OFFICES OF RHEUBAN & GRESEN**  
15910 VENTURA BOULEVARD, SUITE 1610  
ENCINO, CALIFORNIA 91436  
TELEPHONE: (818) 815-2727  
FACSIMILE: (818) 815-2737

Attorneys for Plaintiff, Steve Karagiosian

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-  
GOMEZ; STEVE KARAGIOSIAN;  
ELFEGO RODRIGUEZ; AND JAMAL  
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK; AND DOES 1 THROUGH  
100, INCLUSIVE.

Defendants.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge  
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF'S SUR-REPLY IN OPPOSITION  
TO DEFENDANT'S MOTION *IN LIMINE* NO.  
10 TO EXCLUDE: (A) EVIDENCE OR  
ARGUMENT RE OFFICER BEING  
NICKNAMED "HITLER"; AND (B)  
TESTIMONY OF BRUCE SLOR RE:  
RACIAL/ETHNIC SLURS

TRIAL:

DATE: February 15, 2012

TIME: 9:00 a.m.

DEPT: 37

BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant.

1                   **I. NEW CASE LAW CLARIFIES THAT SUCH EVIDENCE IS ADMISSIBLE**  
2                   **TO SHOW DISCRIMINATORY OR BIASED INTENT OR MOTIVE**

3           In Defendant's Motion *in Limine* No. 10, Defendant seeks to exclude: (1) evidence that  
4 officer Schilf was referred to as "Hitler;" and (2) testimony from Officer Slor regarding ethnic and  
5 racial slurs he heard during more than 15 years at the Burbank Police Department. However, such  
6 evidence is admissible to show discriminatory or biased intent or motive. After Plaintiff filed his  
7 oppositions to Defendant's motions *in limine*, the Court of Appeal for the Fifth Appellate District  
8 issued its opinion in *Pantoja v. Anton* (August 9, 2011) 198 Cal. App. 4th 87. In *Pantoja*, the court  
9 set forth the issue before it:

10           In this employment discrimination case, we are asked to decide whether the court erred in  
11 not allowing the jury to hear "me-too" evidence, that is, evidence of the employer's alleged  
12 gender bias in the form of harassing activity against women employees other than plaintiff.  
13 Here, the me-too evidence related to harassing activity that occurred **outside plaintiff's**  
14 **presence and at times other than when plaintiff was employed.** At issue is whether the  
15 court properly excluded this evidence as propensity or character evidence under Evidence  
16 Code section 1101, subdivision (a), or whether it should have been admitted as evidence of a  
17 discriminatory or biased intent or motive under Evidence Code section 1101, subdivision (b).

18           **We conclude that the evidence should have been admitted and the failure to do so**  
19 **was prejudicial.**

20           (*Pantoja, supra*, at p. 92, emphasis added.)

21           The court discussed *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009)  
22 173 Cal.App.4th 740, which in turn discussed *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir.  
23 Mo. 1988):

24           *Johnson* discussed *Estes*, with approval, at some length: "The *Estes* court observed that a  
25 wholesale exclusion of such evidence 'can be especially damaging in employment  
26 discrimination cases, in which plaintiffs must face the difficult task of persuading the  
27 fact-finder to disbelieve an employer's account of its own motives.' (*Estes, supra*, 856 F.2d at  
28 p. 1103.) The court then went on to quote from *Riordan v. Kempiners* (7th Cir. 1987) 831

1 F.2d 690, where that court observed that the law tries to protect employees from being treated  
2 more harshly than they would be treated ‘ “if they were a different race, sex, religion, or  
3 national origin, but it has difficulty achieving this goal because it is so easy to concoct a  
4 plausible reason for ... firing ... a worker who is not superlative. A plaintiff's ability to prove  
5 discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that  
6 keep out probative evidence because of crabbed notions of relevance or excessive mistrust of  
7 juries.” ’ (*Estes, supra*, 856 F.2d at p. 1103.) . . .”

8 (*Id.* at p. 113.)

9 The *Pantoja* Court further explained:

10 We conclude the trial court abused its discretion when it excluded the me-too evidence,  
11 both when ruling on defendants' in limine motion and when revisiting the issue during trial.  
12 The in limine ruling was an abuse of discretion because it was based on the erroneous  
13 assumption that the me-too evidence was inadmissible no matter what it was offered to  
14 prove. The court said it understood *Johnson*; however, when Pantoja's counsel argued that the  
15 evidence could come in to prove intent, the court's response was that foundational evidence  
16 would be required first—by which it apparently meant evidence that the conduct took place  
17 in Pantoja's presence or was known by her. This response missed the point counsel was  
18 making about *Johnson*, for **the evidence was admissible to prove Anton's intent or motive**  
19 **even if the conduct did not take place in Pantoja's presence and was unknown to her.**  
20 (*Pantoja, supra*, at p.115, emphasis added.)

21 The court further held that:

22 *Johnson* also applies by analogy to Pantoja's claim of hostile environment sexual  
23 harassment. Like her claim that gender discrimination motivated her firing, Pantoja's claim of  
24 hostile environment harassment required her to show a discriminatory intent on [the  
25 defendant's] part. . . . It follows that if the me-too evidence was probative of [the  
26 defendant's] intent in behaving as Pantoja alleged, tending to show that gender bias  
27 motivated the alleged unwanted touching, shouting, and epithets, then that evidence was  
28 admissible under section 1101, subdivision (b). It was not made inadmissible under section

1 1101, subdivision (a), assuming it was not substantially more prejudicial than probative under  
2 Evidence Code section 352.

3 (*Id.* at p.114.)

4 Thus, under *Pantoja*, evidence that officer Schilf was referred to as "Hitler" and  
5 testimony from Officer Slor regarding ethnic and racial slurs he heard during more than 15 years at  
6 the Burbank Police Department are admissible to show discriminatory or biased intent or motive in  
7 Plaintiff's hostile environment harassment cause of action.

8 **II. CONCLUSION**

9 For the foregoing reasons above, and those discussed in Plaintiff's opposition, Plaintiff  
10 respectfully requests that the court deny Defendant's Motion *in Limine* No. 10.

11  
12  
13 DATED: February 9, 2012

LAW OFFICES OF RHEUBAN & GRESEN

14  
15 By: Steven M. Cischke  
16 Steven M. Cischke  
17 Attorneys for Plaintiff, Steve Karagiosian  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles. I am over the age of eighteen and am not a  
4 party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino,  
California 91436.

5 On February 9, 2012, I served a copy of the following documents described as:  
6 **PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE***  
7 **NO. 10 TO EXCLUDE: (A) EVIDENCE OR ARGUMENT RE OFFICER BEING**  
8 **NICKNAMED "HITLER"; AND (B) TESTIMONY OF BRUCE SLOR RE:**  
9 **RACIAL/ETHNIC SLURS** on the interested parties, through their respective attorneys of record in  
10 this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

11 Lawrence A. Michaels  
12 Mitchell Silberberg & Knupp LLP  
13 11377 West Olympic Boulevard  
14 Los Angeles, CA 90064-1683  
Email: LAM@msk.com

Linda Miller Savitt, Esq.  
Ballard Rosenberg Golper & Savitt, LLP  
500 North Brand Boulevard, Twentieth Floor  
Glendale, California 91203  
Email: [lsavitt@brgslaw.com](mailto:lsavitt@brgslaw.com)

11 Carol Ann Humiston  
12 Senior Assistant City Attorney  
13 Office of the City Attorney  
14 275 East Olive Avenue  
Burbank, California 91510-6459  
Email: [chumiston@ci.burbank.ca.us](mailto:chumiston@ci.burbank.ca.us)

Robert Tyson, Esq.  
Burke, Williams & Sorensen, LLP  
444 South Flower Street, Suite 2400  
Los Angeles, California 90071  
Email: [Rtyson@bwslaw.com](mailto:Rtyson@bwslaw.com)

15 Thomas G. Mackey, Esq.  
16 Jackson Lewis LLP  
17 725 South Figueroa Street, Suite 2500  
Los Angeles, California 90017  
Email: [mackeyt@jacksonlewis.com](mailto:mackeyt@jacksonlewis.com)

18 XX **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package  
19 provided by an overnight delivery carrier and addressed as above. I placed the envelope or  
20 package for collection and overnight delivery at an office or a regularly utilized drop box of  
the overnight delivery carrier.

21 XX **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an  
22 agreement of the parties to accept service by e-mail or electronic transmission, I caused the  
23 documents to be sent to the person(s) at the e-mail address listed above. My electronic  
notification address is [ag@rglawyers.com](mailto:ag@rglawyers.com). I did not receive, within a reasonable time after  
the transmission, any electronic message or other indication that the transmission was  
unsuccessful.

24 XX **STATE:** I declare under penalty of perjury under the laws of the State of California that the  
25 above is true and correct.

26 Executed on February 9, 2012, at Encino, California.

27 \_\_\_\_\_  
Annette Goldstein